



**MINUTES
FREMONT PLANNING COMMISSION
REGULAR MEETING OF MAY 13, 2004**

CALL TO ORDER: Chairperson Weaver called the meeting to order at 7:07 p.m.

PRESENT: Chairperson Weaver, Vice Chairperson Wieckowski, Commissioners Harrison, King, Lydon, Natarajan (arrived 7:27 p.m.), Sharma

ABSENT: None

STAFF PRESENT: Jeff Schwob, Deputy Planning Director
Larissa Seto, Senior Deputy City Attorney II
Jay Swardenski, Hazmat Program Manager
Nancy Minicucci, Associate Planner
Alice Malotte, Recording Clerk
Chavez Company, Remote Stenocaptioning
Walter Garcia, Video Technician

APPROVAL OF MINUTES: None to approve.

CONSENT CALENDAR

IT WAS MOVED (HARRISON/KING) AND UNANIMOUSLY CARRIED BY ALL PRESENT THAT ITEM NUMBER 8 BE ADDED TO THE CONSENT LIST.

THE CONSENT LIST CONSISTED OF ITEM NUMBERS 1, 3, 4, 5, 6, 7 AND 8.

Commissioner Harrison asked that a separate vote be taken for Item 4, as he planned to recuse himself, since his family had a lease hold interest in property across the street.

IT WAS MOVED (HARRISON/KING) AND UNANIMOUSLY CARRIED BY ALL PRESENT THAT THE PLANNING COMMISSION TAKE THE FOLLOWING ACTIONS ON ITEM NUMBERS 1, 3, 5, 6, 7, AND 8:

Item 1. **BACCARAT RAILROAD LLC – 41075 Railroad Avenue – (PLN2000-00059)** – to consider an appeal regarding the completeness of an application for a Preliminary Grading Plan and an Initial Study and to consider a Preliminary Grading Plan for a 15-acre site zoned I-L Light Industrial located in the Irvington Planning Area. (Continued from April 8, 2004.)

Deputy Planning Director Schwob noted that staff had received a verbal request that this item be continued to June. However, it was not requested in writing and had already been posted as continued to May 27th, so it would probably be continued one more time.

CONTINUE TO MAY 27, 2004.

- Item 3. WALNUT/MISSION – 38987 Mission Boulevard – (PLN2004-00189)** - to consider a Tentative Tract Map, Preliminary Grading Plan and Private Street approval for 25 residential condominium units located at the westerly quadrant of Mission Boulevard and Walnut Avenue in the Central Planning Area. A Mitigated Negative Declaration was previously approved for the General Plan Amendment and Planned District for this project. (Continued from April 22, 2004.)

CONTINUE TO MAY 27, 2004.

- Item 5. SETHI RESIDENCE – 44989 Vista Del Sol – (PLN2004-00136)** – to consider a Planned District Minor Amendment for a new 9,500-square foot two-story detached single-family dwelling (including garage) in the Mission San Jose Planning Area. This project is categorically exempt from review under CEQA pursuant to Section 15303 (New Construction or Conversion of Structures).

HOLD PUBLIC HEARING;

AND

FIND THE PD MINOR AMENDMENT, PLN2004-00136, IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S EXISTING GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S NATURAL RESOURCES CHAPTER. REFERENCE IS MADE TO THE 'GENERAL PLAN CONFORMANCE' SECTION ABOVE THAT DISCUSSES HOW THE PROPOSAL SATISFIES THE POLICIES RELEVANT TO THIS CONFORMANCE FINDING;

AND

FIND THAT THE PROJECT HAS BEEN EVALUATED FOR THE POTENTIAL TO CAUSE AN ADVERSE EFFECT—EITHER INDIVIDUALLY OR CUMULATIVELY—ON WILDLIFE RESOURCES. THERE IS NO EVIDENCE THAT THE PROPOSED PROJECT WOULD HAVE ANY POTENTIAL FOR ADVERSE EFFECTS ON WILDLIFE RESOURCES;

AND

APPROVE PD MINOR AMENDMENT PLN2004-00136, AS SHOWN ON EXHIBIT “A”, SUBJECT TO CONDITIONS ON EXHIBIT “B” AND THE COLOR AND MATERIAL SAMPLE BOARD AS EXHIBIT “C”.

- Item 6. MISSION HILLS TENNIS LIGHTS – 10 East Las Palmas Avenue – (PLN2004-00187)** - to consider a minor amendment to a Planned District to allow the illumination of two existing tennis courts for evening use on property located in the Mission San Jose Planning Area. This project is categorically exempt from review under CEQA pursuant to Section 15303(a) (Exterior alterations – electrical conveyances).

HOLD PUBLIC HEARING;

AND

FIND PLN2004-00187 IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S EXISTING GENERAL PLAN. THESE PROVISIONS INCLUDE THE GOALS OF THE PRIVATE OPEN SPACE USES. THE PROJECT CONFORMS TO THE GOALS OF PLANNED DISTRICT, P-73-1 AND THE OBJECTIVES OF THE MISSION SAN JOSE PLANNING AREA;

AND

FIND PLN2004-00187 AS PER EXHIBIT “B” FULFILLS THE APPLICABLE REQUIREMENTS SET FORTH IN THE FREMONT MUNICIPAL CODE.

- Item 7. FREMONT RETAIL – NE Auto Mall Parkway at Boscell Road – (PLN2004-00199)** – to consider a preliminary grading plan for the development of a multi-tenant commercial center. This project is exempt from CEQA per Section 15304(a) of the Guidelines as having no potential to cause a significant effect on the environment.

HOLD PUBLIC HEARING;

AND

FIND THAT THE PROJECT HAS BEEN EVALUATED THE POTENTIAL FOR TO CAUSE AN ADVERSE EFFECT -- EITHER INDIVIDUALLY OR CUMULATIVELY -- ON WILDLIFE RESOURCES. T HERE IS NO EVIDENCE THE PROPOSED PROJECT WOULD HAVE ANY POTENTIAL FOR ADVERSE EFFECT ON WILDLIFE RESOURCES;

AND

FIND PLN2004-00199 IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S EXISTING GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S NATURAL RESOURCES CHAPTER AS ENUMERATED WITHIN THE STAFF REPORT. THE PROJECT CONFORMS TO THE GOALS AND OBJECTIVES OF THAT CHAPTER;

AND

APPROVE PLN2004-00199, AS SHOWN ON EXHIBIT "A", SUBJECT TO FINDINGS AND CONDITIONS ON EXHIBIT "B".

- Item 8. I-L LIGHT INDUSTRIAL DISTRICT MODIFICATIONS - Citywide - (PLN2004-00155) - to consider a Zoning Text Amendment (ZTA) to regulate certain land uses which use hazardous materials. This project is exempt from CEQA per Section 15061(b)(3), as the project has no ability to cause a significant effect on the environment.**

HOLD PUBLIC HEARING;

AND

RECOMMEND THAT THE CITY COUNCIL FIND THIS PROJECT EXEMPT FROM CEQA REVIEW PER SECTION 15061(B)(3), BECAUSE THE PROJECT HAS NO POTENTIAL FOR CAUSING A SIGNIFICANT EFFECT ON THE ENVIRONMENT;

AND

RECOMMEND THAT THE CITY COUNCIL FIND THAT PLN2004-00155 IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S LAND USE AND HEALTH & SAFETY CHAPTERS AS ENUMERATED WITHIN THE STAFF REPORT;

AND

RECOMMEND THAT THE CITY COUNCIL FIND THE PUBLIC NECESSITY, CONVENIENCE AND GENERAL WELFARE REQUIRE THE ADOPTION OF THIS ZONING TEXT AMENDMENT PLN2004-00155 BECAUSE IT ASSIST IN PREVENTING ADVERSE IMPACTS ASSOCIATED WITH THESE USES FROM OCCURRING WITHIN THE LIGHT INDUSTRIAL DISTRICT;

AND

RECOMMEND PLN2004-00155 TO THE CITY COUNCIL IN CONFORMANCE WITH EXHIBIT "A" (ZONING TEXT AMENDMENT).

The motion carried by the following vote:

AYES:	6 – Harrison, King, Lydon, Sharma, Weaver, Wieckowski
NOES:	0
ABSTAIN:	0
ABSENT:	1 - Natarajan
RECUSE:	0

IT WAS MOVED (WIECKOWSKI/KING) AND CARRIED BY THE FOLLOWING VOTE (6-1-0-0-1) THAT THE PLANNING COMMISSION TAKE THE FOLLOWING ACTION ON ITEM NUMBER 4:

- Item 4. **MAPLE STREET PRECISE PD, GRADING PLAN & TENTATIVE TRACT MAP (TR 7477) – 37237 Maple Street – (PLN2003-00200, PLN2004-00027, PLN2004-00028)** – to consider a Precise Planned District for nine single-family homes located in the Centerville Planning Area. To consider a Preliminary Grading Plan & Tentative Tract Map for the Maple Street Residential project located at Baine Avenue, Maple Street and Hansen Avenue in the Centerville Planning Area. A Mitigated Negative Declaration has been adopted as part of the General Plan Amendment approved under PLN2003-00200.

MODIFICATION TO STAFF REPORT

Please be advised that the word Vesting should be added to all areas in the report where the proposed Tentative Tract Map is discussed. The following section shows modifications in areas in the report where the project, recommended action and enclosures are described.

First page under proposal:

To consider a Precise Planned District rezoning (P-2003-200) for nine single-family homes located in the Centerville Planning Area. To consider a Preliminary Grading Plan & Vesting Tentative Tract Map for the combined single family and multi-family elements of the Maple Street Residential project located at Baine Avenue, Maple Street and Hansen Avenue in the Centerville Planning Area.

First page under Recommended Action:

Recommend the Precise Planned District application to City Council; Approve the Grading Plan and Vesting Tentative Tract Map, based on Findings and Conditions

Page 12:

Enclosures: Exhibit “D” Vesting Tentative Tract Map (*staff amended*)
 Exhibit “E” Vesting Tentative Tract Map Conditions of Approval

Exhibits: Exhibit “D” Vesting Tentative Tract Map (*staff amended*)

Recommended Actions:

1. Hold public hearing.
2. Find PLN2003-00200 is in conformance with the relevant provisions contained in the City's existing General Plan. These provisions include the designations, goals and policies set forth in the General Plan's Land Use, and Housing Elements as enumerated within the staff report.
3. Recommend PLN2003-00200 to the City Council in conformance with Exhibit “B” (Site, Architecture, Landscape Plans), Exhibit “A” (Rezoning Exhibit), Exhibit “C” (Planned District Findings and Conditions of Approval), Exhibit “H” (Color and Material Sample Board).
4. Find PLN2004-00027 (Preliminary Grading Plan) & PLN2004-00028 (Vesting Tentative Tract Map 7477), as per Exhibit “F” (Preliminary Grading Plan) and Exhibit “D” (Vesting Tentative Tract Map 7477) fulfills the applicable requirements set forth in the Fremont Municipal Code.

5. Approve Preliminary Grading Plan (as shown in Exhibit "F") and subject to findings and conditions in Exhibit "G", and Vesting Tentative Tract Map 7477 (as shown in Exhibit "D") and subject to findings and conditions in Exhibit "E".

HOLD PUBLIC HEARING;

AND

FIND PLN2003-00200 IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S EXISTING GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S LAND USE, AND HOUSING ELEMENTS AS ENUMERATED WITHIN THE STAFF REPORT;

AND

RECOMMEND PLN2003-00200 TO THE CITY COUNCIL IN CONFORMANCE WITH EXHIBIT "B" (SITE, ARCHITECTURE, LANDSCAPE PLANS), EXHIBIT "A" (REZONING EXHIBIT), EXHIBIT "C" (PLANNED DISTRICT FINDINGS AND CONDITIONS OF APPROVAL), EXHIBIT "H" (COLOR AND MATERIAL SAMPLE BOARD);

AND

FIND PLN2004-00027 (PRELIMINARY GRADING PLAN) & PLN2004-00028 (VESTING TENTATIVE TRACT MAP 7477), AS PER EXHIBIT "F" (PRELIMINARY GRADING PLAN) AND EXHIBIT "D" (VESTING TENTATIVE TRACT MAP 7477) FULFILLS THE APPLICABLE REQUIREMENTS SET FORTH IN THE FREMONT MUNICIPAL CODE;

AND

APPROVE PRELIMINARY GRADING PLAN (AS SHOWN IN EXHIBIT "F") AND SUBJECT TO FINDINGS AND CONDITIONS IN EXHIBIT "G", AND VESTING TENTATIVE TRACT MAP 7477 (AS SHOWN IN EXHIBIT "D") AND SUBJECT TO FINDINGS AND CONDITIONS IN EXHIBIT "E".

The motion carried by the following vote:

AYES:	5 - King, Lydon, Sharma, Weaver, Wieckowski
NOES:	0
ABSTAIN:	0
ABSENT:	1 - Natarajan
RECUSE:	1- Harrison

PUBLIC COMMUNICATIONS

ORAL COMMUNICATIONS

PUBLIC HEARING ITEMS

- Item 2. MIXED-USE DEVELOPMENT CRITERIA – Citywide – (PLN2004-00002)** – to consider a Zoning Text Amendment to establish criteria for mixed-use development in accordance with Program No. 15 of the City of Fremont's Housing Element. Program No. 15 states that the City is to review its existing policies for mixed-use developments and amend the requirements to encourage housing, especially affordable housing. To implement Program No. 15, the following changes are being proposed: (1) inclusion of mixed-use development review under a three-pronged approach (i.e., Zoning Administrator, Planning Commission or City Council depending on the complexity of a proposed project) in the C-O Administrative Office District, C-N Neighborhood Commercial District, C-C Community Commercial District, C-B-D Central Business District, and C-T Thoroughfare Commercial District; (2) inclusion of more easily identifiable principles and standards for mixed-use developments as a whole; and, (3) revisions to existing standards and criteria for mixed-use developments in respects to parking and planned districts. A Negative Declaration has been prepared for the project. (Continued from April 8, 2004.)

MODIFICATION TO STAFF REPORT

Comments have been received from John Weed regarding the provision of live/work units and mixed-use developments. He is concerned that under the current proposed language, a mixed-use development cannot consist predominately of live/work units. His comment is that the commercial properties abutting the alleyway in Niles could best be developed as live/work units due to their size and location. However, these sites would be precluded from doing so under the proposed language in a mixed-use project. He was informed that under a planned district, the City Council would be able to consider projects that are substantial modifications or deviations from the mixed-use criteria such as a project consisting entirely of live/work units. In response, he is requesting that the live/work unit provision in the criteria be amended to cross-reference Council approval is required for a project where live/work units is a predominate use.

The mixed-use development criteria was developed to be applied to commercial areas in general and; therefore, did not take into account nuances pertinent to a specific neighborhood. It did, however, include provisions that allow for the consideration of a mixed-use project under the planned district process that requires substantial modifications or deviations from the criteria such as one that consisted entirely of live/work units. To amend the live/work provision to cross-reference to the planned district process outlined in the Reviewing Authority subsection would be redundant.

Deputy Planning Director Schwob noted the above modifications and stated that, as the ordinance was currently written, a solely residential or a solely live/work project was not allowed within a commercial district. However, through the Planned District process, variations to the proposed standards could be considered, and staff believed that no further modification was necessary. The document had been reorganized to separate the design guidelines from the regulations. The purpose statement was also included.

Chairperson Weaver opened the public hearing.

Megan Benz, Environmental Engineer for New United Motor Manufacturing, Inc. (NUMMI), stated that she was speaking on behalf of NUMMI. NUMMI agreed with the proposed exceptions, but recommended that the definition of the proposed exception in Appendix A, Sections 3-15, be expanded to include as the exception for the mixed-use development all of the areas bounded by Auto Mall Parkway, Mission Boulevard, I-880 and I-680. The existing transportation and environmental patterns had already adversely impacted this area and might be a source of complaints for future residents.

Commissioner Lydon asked that the suggested boundaries be restated.

Ms. Benz reiterated that the boundaries were I-680, I-880, Mission Boulevard and Auto Mall Parkway.

Commissioner Sharma asked if she was interested in the rectangle formed by these boundaries to be exempted.

Ms. Benz agreed. As currently written, it implied that only the areas close to the roads would be exempted.

Deputy Planning Director Schwob stated that the map behind the Commission showed the areas that excluded mixed-use potential. The proposal would not allow mixed use within commercial designations along Auto Mall Parkway, I-880 and Mission Boulevard. NUMMI was interested in not allowing mixed use anywhere within the rectangle formed by those roads along with I-680.

John Weed, Mission Boulevard property owner, asked that the phrase, "In no case shall a mixed-use development consist predominantly of live/work units" be deleted from throughout the document. Live/work projects were highly desirable. The alleys in Niles would provide for a wonderful live/work development. As written, the amendment would discourage anyone from considering such development within the City.

Commissioner King asked where the text was located.

Mr. Weed gave the pages and sections where the phrase could be found.

Vice-Chairperson Wieckowski asked the speaker to point out the language that concerned him the most on Page 14 of 16 regarding the development standards for live/work units.

Mr. Weed stated that he agreed with the definition of live/work. He objected that the amendment stated that a project could not be predominately live/work.

Commissioner King asked if staff had an opinion about the speaker's suggestion.

Deputy Planning Director Schwob agreed that the phrase that the speaker objected to was probably not critical to the overall ordinance. Staff feared that an end run around the ordinance might be tried, as live/work units tended to be more "live" than "work". For example, a potential live/work owner/tenant could claim a business and move in when there was no such business. Turning commercial zones into residential zones was also a concern. Mixed use would not have to be all on one parcel, but could be subdivided into many different adjacent parcels. If those parcels were sold to other owners, when looking at them individually, they might be one use or another, but taken as a whole they would not be predominately residential. This amendment would not preclude a specific project as proposed by the speaker.

Commissioner King asked if the word "residential" were left in, would it contradict the last sentence and would a mixed-use development project need approval of the Planning Commission and the City Council.

Deputy Planning Director Schwob suggested wording, such as, "Mixed-use developments should not consist predominately of live/work units." Most of these kinds of projects would be reviewed by the Commission via a use permit or by both the Planning Commission and City Council through a planned district. A small, reuse of an existing building would probably be reviewed and approved by staff [Zoning Administrator].

Mr. Weed asked again that "In no case . . ." be deleted. He believed that live/work units were at the high end of the mixed-use component, as business owners and residents became part of the social fabric of the community. He asked that ". . . other equitable formula, if appropriate." be added to the parking requirement. Some of the deeper parcels in Niles with limited, narrow frontage would be at a disadvantage when it came to meeting parking requirements.

Deputy Planning Director Schwob clarified that NUMMI's suggestion had not been taken into consideration, because City Council had directed staff and consultants to study four alternatives for the Warm Springs Specific Plan and those studies should determine the outcome rather than the Mixed-Use Ordinance. In the short term, no residential would be allowed within the rectangular area, because it was currently zoned industrial.

Chairperson Weaver closed the public hearing.

Commissioner Harrison asked if NUMMI was participating in the Warm Springs Specific Plan Study.

Deputy Planning Director Schwob stated that they were, although they were not located within the specific plan boundaries.

Vice-Chairperson Wieckowski asked if a developer could purchase a cluster of the City's excess properties to develop a mixed-use project, rather than each parcel looked at for parking, open space requirements, etc.

Deputy Planning Director Schwob replied that the definition stated that one or more lots could be developed as a cohesive project. Using The Benton as an example, he stated that it was predominately residential with commercial on just the corner and mixed uses in some of the buildings. Parking could be allowed on one lot of the development, but it would have to be tied together by maintenance and reciprocal agreements that would restrict the owner from selling it or developing it independently at a later time.

Commissioner Harrison complimented staff on the reorganization of the ordinance, which made it flow better and made it easier to read. On Page 7 of 16, he asked how "green" would the new building have to be to be eligible for an increase in Floor Area Ratio.

Vice-Chairperson Wieckowski suggested that the applicant should conform to the existing standards.

Commissioner Natarajan suggested that ten percent for private buildings over what was required by Title 24 could be used as a threshold for compliance with the City's green building definition.

Deputy Planning Director Schwob suggested that a definition of a green building could be added.

Commissioner Natarajan also complimented staff for pulling the ordinance together. She noted that the small, half-acre sites were to be reviewed by the Zoning Administrator and the larger projects would go to the City Council. In her opinion, the smaller sites were the most difficult and she suggested that the Planning Commission review those projects in some form of public hearing.

Deputy Planning Director Schwob suggested that projects within existing buildings be reviewed and approved by the Zoning Administrator, and projects that included new development on in-fill sites be reviewed by the Planning Commission.

A discussion ensued concerning Mr. Weed's suggestions regarding live/work units and parking. It was agreed to leave some flexibility and the statement should read as shown below in the summary.

Deputy Planning Director Schwob summarized the other suggested changes:

- Suggested language within definition section on Page 1 of 16 Sec 8-21622.9.7: ~~In no case shall a mixed-use development consist of predominately live/work units~~ Mixed-use developments should not consist exclusively of live/work units and would be repeated on Page 14 of 16, 8C
- Level of review and authority, Page 16 of 16 (h)(1)a.: Mixed-use projects within existing structures, no maximum number of units, would be reviewed by Zoning Administrator. All other projects, including new development regardless of acreage, would be reviewed by Planning Commission.

- Based upon mixed use parking requirements, the base requirement for mixed-use developments shall comply with residential and commercial parking standards set forth in this section, unless project is located in special parking district in which those provisions shall apply.
- Add a green building definition, to the zoning code. (10% over Title 24 requirements.)

IT WAS MOVED (HARRISON/SHARMA) AND CARRIED BY THE FOLLOWING VOTE (7-0-0-0) THAT THE PLANNING COMMISSION
HOLD PUBLIC HEARING;

AND

RECOMMEND THAT THE CITY COUNCIL FIND THE INITIAL STUDY HAS EVALUATED THE POTENTIAL FOR THIS PROJECT TO CAUSE AN ADVERSE EFFECT -- EITHER INDIVIDUALLY OR CUMULATIVELY -- ON WILDLIFE RESOURCES. THERE IS NO EVIDENCE THE PROPOSED PROJECT WOULD HAVE ANY POTENTIAL FOR ADVERSE EFFECT ON WILDLIFE RESOURCES;

AND

RECOMMEND THAT THE CITY COUNCIL APPROVE DRAFT NEGATIVE DECLARATION WITH ACCOMPANYING CERTIFICATE OF FEE EXEMPTION AND FIND IT REFLECTS THE INDEPENDENT JUDGEMENT OF THE CITY OF FREMONT;

AND

RECOMMEND THAT THE CITY COUNCIL FIND THAT PLN2004-00002 IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S LAND USE AND HOUSING ELEMENTS AS ENUMERATED WITHIN THE STAFF REPORT;

AND

RECOMMEND THAT THE CITY COUNCIL FIND THE PUBLIC NECESSITY, CONVENIENCE AND GENERAL WELFARE REQUIRE THE ADOPTION OF THIS ZONING TEXT AMENDMENT PLN2004-00002 BECAUSE THE PROPOSED TEXT CHANGES ARE NEEDED TO ASSURE THE DEVELOPMENT OF HIGH QUALITY, APPROPRIATE MIXED-USE DEVELOPMENTS COMPATIBLE WITH ADJACENT NEIGHBORHOODS AND TO ASSIST IN THE REVITALIZATION OF EXISTING COMMERCIAL AREAS, IN ORDER TO MEET THE NEEDS IDENTIFIED BY THE CITY'S HOUSING PLN2004-00002-REVISED PC REPT-RW MIXED-USE DEVELOPMENT CRITERIA MAY 13, 2004 PLN2004-00002 PAGE 7 OF 7 ELEMENT, IS NOT FEASIBLE WITHOUT THE MODIFICATIONS TO ASSOCIATED PORTIONS OF THE FREMONT MUNICIPAL CODE, AS SHOWN IN EXHIBIT "A";

AND

RECOMMEND PLN2004-00002 TO THE CITY COUNCIL IN CONFORMANCE WITH REVISED EXHIBIT "A" (ZONING TEXT AMENDMENT) AS AMENDED;

AND

RECOMMEND THAT THE CITY COUNCIL DIRECT STAFF TO PREPARE MIXED-USE DEVELOPMENT DESIGN GUIDELINES FOR REVIEW AND APPROVAL.

The motion carried by the following vote:

AYES:	7 – Harrison, King, Lydon, Natarajan, Sharma, Weaver, Wieckowski
NOES:	0
ABSTAIN:	0
ABSENT:	0
RECUSE:	0

Chairperson Weaver called for a recess at 7:50 p.m.

Chairperson Weaver called the meeting back to order at 8:00 p.m.

- Item 9. GAME OR COMPUTING ARCADES – Citywide – (PLN2004-00004)** – to consider a Zoning Text Amendment to allow game or computing arcades less than 1,200 square feet in size in C-N Neighborhood Commercial Districts, subject to a Conditional Use Permit (Jimmy Lee d.b.a. HyperNet, Applicant). The Planning Division also proposes modifications to the applicable definitions and operational standards, to provide standards and consistent terminology for game or computing devices and arcades in all districts. This project is exempt from review under CEQA per the general rule in Section 15061(b)(3) of the CEQA Guidelines.

MODIFICATION TO STAFF REPORT

Correction of typographical error.

The Staff Report correctly notes that the Police Department and other City staff recommend that, for arcades which provide internet access, the manager must be at least 21 years of age and all employees at least 18 years of age. This was incorrectly printed in the proposed zoning text amendment in Exhibit A. Therefore, staff recommends that Exhibit A, page 26 of 27, Section 8-22140.8(d)(2)a. should be amended to read:

"A manager 21 years of age or older shall be on-site during business hours at all times. No employee shall be under 18 years of age."

Substantive Revision.

Based on a recent Southern California court decision recognizing First Amendment and privacy interests implicating by government regulation of businesses that offer internet access, staff recommends that the proposed zoning text amendment (ZTA) be amended to:

- limit City discretion to add conditions to zoning administrator permits (ZAPs) or conditional use permits (CUPs) to only those matters relating to safety / crime prevention, traffic, design, and noise
- delete decision makers' ability to "impose any additional conditions that may be appropriate"
- only require business operators to provide sign-in logs and video surveillance tapes to law enforcement when a criminal investigation is taking place or upon issuance of a court warrant

These proposed amendments are more specifically set forth, as follows, with amendments shown in double underline, and deletions shown in strike out:

Sec. 8-22140.8

- (b) *Internet access*. No establishment shall allow a customer access to the Internet by means of a game or computing device until the customer has presented a valid photographic identification document and has signed in, and an employee of the establishment has examined the document and verified the customer's identity and age.

(1) *ID requirements*: [NO PROPOSED MODIFICATIONS]

(2) *Sign-in requirements:* In order to have access to the Internet, a customer shall sign a written log that indicates acceptance of the policy regarding adult material described below (and other policies of the house, at the establishment's discretion) and that includes the following information as verified by an employee of the establishment: the customer's true name; the type, serial number and expiration date of the identification document presented; the date and time of using a device with access to the Internet; and the specific device used.

- a. Upon surrendering the use of a device with access to the Internet, the customer shall sign out, or an employee of the establishment shall sign the customer out, indicating the time.
- b. The log shall be kept for 120 days and shall be surrendered when requested by law enforcement for a criminal investigation or upon issuance of a court warrant on request to authorized law enforcement personnel.
- c. After 120 days, such log shall be completely destroyed.

(3) *Adult material:* [NO PROPOSED MODIFICATIONS]

(d) *Game or computing arcades.*

(1) *Criteria for evaluation of game or computing arcades.* Notwithstanding Section 8-22509 and 8-22552, the following are the exclusive criteria which shall be used in evaluating an application for a conditional use permit or zoning administrator permit for a game or computing arcade:

- a. Compatibility of the arcade to existing and proposed developments within the area with regard to design and noise.
- b. Suitability of location in terms of access, circulation and parking.
- c. Proximity to schools, religious facilities, residential districts and other uses.
- d. Proposed hours of operation.
- e. Adequacy of adult supervision.
- f. Proposed number of amusement devices in relation to the gross floor area of the principal use.
- g. Potential for increased enforcement and police response.

(2) *Standard requirements.* : [NO PROPOSED MODIFICATIONS]

(3) *Additional requirements that may be imposed.* Where appropriate and evidence demonstrates that security or crime prevention requires such condition, the approving agency may impose any of the following additional conditions of approval:

- a. The arcade shall provide security personnel, who shall be responsible to prevent violations of law, to enforce the prohibitions on waiting outside and loitering and to ensure that all patrons leave the property within thirty (30) minutes of the establishment's closing. Any such security personnel shall be licensed as required by state law and shall be uniformed in a manner to distinguish them clearly from local public law enforcement or other government personnel. One or more persons not to include the security personnel shall be responsible for admission to the establishment.

- b. Automatic video surveillance equipment shall be installed and operated allowing the on-site manager to monitor and record activities throughout the establishment in real time. The recordings shall be kept for at least one month and made available when requested by law enforcement for a criminal investigation or upon issuance of a court warrant.
- c. ~~Nothing in this section shall prevent the approving agency from imposing any additional conditions that may be appropriate.~~

Senior Deputy City Attorney Seto stated that a recent court decision published in Southern California had recognized the rights of access to the Internet, as well as, arcade games, that provided First Amendment and privacy expectations. The court indicated that cities should not have complete discretion to add any type of condition they wished, because it would be improper restraint on free speech and First Amendment rights. The applied restrictions or conditions should be “time, place and manner restrictions not related to the content of the activities going on.” The court did uphold other regulations similar to what the City was proposing, such as the video surveillance, the employee age minimums, and other different types of activities.

Deputy Planning Director Schwob explained that the City Council chose not to adopt the ordinance in the form in which it had been previously recommended. They felt that karaoke booths should be included, and that the Planning Commission should review most of these permits.

Commissioner Harrison clarified that all of the changes noted in the “Modification to Staff Report” section of the agenda would be reflected in the staff report to the City Council.

Commissioner Sharma wondered how the City would assure that all records would be kept correctly.

Deputy Planning Director Schwob replied that a walk-through was usually performed to ensure that all conditions were met. It was always possible that equipment could break down for a day or two until it was repaired. If records were needed and the applicant was not able to produce them, the owner was then in violation of his/her use permit. The records could not be randomly requested by the City without a rationale.

Chairperson Weaver opened the public hearing.

Jimmy Lee, applicant, stated that each computer already had its login.

Chairperson Weaver replied that she believed the login condition was similar to massage therapy businesses that kept a logs where each individual customer signed in.

Mr. Lee asked if a customer had to log in every time he logged onto a computer.

Deputy Planning Director Schwob likened the log to a hotel register where the individual logged on only once per visit.

Commissioner Sharma asked if most of the conditions had been implemented in the applicant's place of business, i.e., lighting, see-through glass. He asked if the applicant was willing to comply with all of the conditions.

Mr. Lee stated that he had blinds. He could pull them up and the interior of the building would be visible from outside. He understood and would adhere to the conditions.

Chairperson Weaver closed the public hearing.

Vice-Chairperson Wieckowski wondered why some of the games (such as crane devices and a fortune telling machine) were included on the list on Page 4, because of the possibility of lines of customers waiting to play/operate these devices developing outside the establishment. Were these games something that the City truly wanted to regulate? He continued to have First Amendment concerns about the regulations and felt that policing actions should not be pushed onto the owner. He would not support the ordinance in its current form.

Deputy Planning Director Schwob replied that many different games combined together could constitute an arcade.

Commissioner Lydon stated that he hoped that the applicant understood that City staff and police, in particular, had worked hard to ensure the success of his business. He asked if this was the final chance for the applicant to be made aware of the conditions.

Deputy Planning Director Schwob stated that when the ordinance took effect, the applicant would come back before the Planning Commission for a Conditional Use Permit where everything should be crystal clear. Some time frames would be set at that point for the modifications that were to be made to the existing operation and staff would perform a follow-up.

Commissioner King asked if this amendment had come about because of past problems within the City.

Deputy Planning Director Schwob replied it came about as a result of the applicant making a request and that he was located in a zone that did not allow this use. It was decided that this was a good time to bring the code into conformity with the current day and age.

Senior Deputy City Attorney Seto stated that the Police Department had told the City Council that some investigations had occurred in the City and in neighboring cities as a result of criminal activity where these uses were operating. Many of these proposed conditions had been proposed by the Police Department, i.e., the visual access into the interior of the building, as a result of police department experiences.

Commissioner King admitted that he had no idea about how to vote on this issue. He asked Vice-Chairperson Wieckowski to expand upon his free speech concerns and how he might otherwise word the conditions.

Vice-Chairperson Wieckowski replied that some of his concerns had been addressed by the new court ruling noted above. The business owner should not have to regulate the people who were outside the confines of his business. He understood the concern about gangs; however, there could be legitimate people who had the right to assemble outside. He understood that an Internet café was a "place where people liked to hang out . . . people would pop in." These regulations were stronger and more restrictive than those for the computers that accessed the Internet at the public library. It was actually rather clever to use the zoning ordinance to force the applicant to keep people from gathering in front of his business; he was required to maintain the log; and he had to buy and maintain the video equipment or he would not receive an approval.

Commissioner King asked if Vice-Chairperson Wieckowski had an alternate proposal.

Commissioner Sharma saw the conditions as being similar to the law that expected operators of retail establishments to card customers who wished to purchase cigarettes. In his opinion, misuse of the Internet could be more dangerous than the consumption of a pack

of cigarettes. Many businesses required the customer to sign a log, such as a doctor's office. Requiring a person to be a legal adult to be hired to work in this establishment was a practical condition, given the kind of business that the applicant was operating.

Commissioner Harrison opined that these conditions were trying to balance First Amendment rights with public safety. He read from the report a comment from the Police that expressed concern about illegal activities being performed when utilizing the computers in such an establishment without the ability to identify potential perpetrators. In his opinion, this ordinance came as close as possible to balancing the applicant's right to an opportunity to operate a successful business, providing access to the internet by the public, and allowing these public safety officers access to provide public safety. He would support the recommendation. He complimented the applicant for his patience with the machinations of government.

Chairperson Weaver was also slightly troubled, as was Vice-Chairperson Wieckowski, about some of the conditions. As long as the sign-in log hooked a customer up with a specific device, she could support the ordinance. However, if the log did not specify who was using which computer, it would have no nexus between a legitimate police function and the keeping of the log. She would support the ordinance.

IT WAS MOVED (HARRISON/SHARMA) AND CARRIED BY THE FOLLOWING VOTE (7-0-0-0) THAT THE PLANNING COMMISSION HOLD PUBLIC HEARING;

AND

FIND PLN2004-0004 IS EXEMPT FROM REVIEW UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT PER THE GENERAL RULE IN SECTION 15061(B)(3) OF THE CEQA GUIDELINES;

AND

FIND PLN2004-00004 IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S LAND USE CHAPTER AS ENUMERATED IN THE STAFF REPORT;

AND

FIND THE PUBLIC NECESSITY, CONVENIENCE AND GENERAL WELFARE REQUIRE THE ADOPTION OF THIS ZONING TEXT AMENDMENT PLN2004-00004 IN ORDER TO ACCOMMODATE THE NEEDS OF RESIDENTS WITH LIMITED ACCESS TO COMPUTERS AND OTHER USERS OF GAME OR COMPUTING ARCADES WHILE ENHANCING THE SUITABILITY OF ARCADES AS AN ENVIRONMENT FOR YOUNG PEOPLE AND MITIGATING THEIR IMPACTS ON LAW ENFORCEMENT AND ON SURROUNDING USES;

AND

RECOMMEND PLN2004-00004 TO THE CITY COUNCIL IN CONFORMANCE WITH EXHIBIT "A" (ZONING TEXT AMENDMENT) AS AMENDED.

The motion carried by the following vote:

AYES:	7 – Harrison, King, Lydon, Natarajan, Sharma, Weaver
NOES:	1 - Wieckowski
ABSTAIN:	0
ABSENT:	0
RECUSE:	0

MISCELLANEOUS ITEMS

Information from Commission and Staff:

- Information from staff: Staff will report on matters of interest.
- Information from Commission: Commission members may report on matters of interest.

Commissioner Harrison, regarding the Mission Hills Tennis Club lighting, complimented staff and way they worked with the applicant and how they had encouraged the applicant to work with concerned neighbors to make certain everyone was satisfied.

Chairperson Weaver echoed those comments. She had expected to see it on the public hearing calendar.

Commissioner Natarajan asked how the Warm Springs Specific Plan was proceeding and if it was time for a study session.

Deputy Planning Director Schwob replied that the Planning Director and the project planner were working diligently with the consultants, and he promised to email the Commissioners regarding the exact status. He agreed that a study session should be scheduled.

Commissioner King asked for a clarification about disclosure with regards to speaking to an interested party about City business.

A discussion ensued and it was agreed that if a conversation with an applicant (or someone associated with an applicant) was undertaken outside of the public hearing, it should be publicly disclosed when the item was brought up during the public hearing.

Commissioner Sharma suggested that the new Commissioners could benefit from another discussion about the Brown Act. It was suggested that the City Attorney be consulted, as needed, by Commissioners for an update or questions.

Meeting adjourned at 8:30 p.m.

SUBMITTED BY:

Alice Malotte
Recording Clerk

APPROVED BY:

Jeff Schwob, Secretary
Planning Commission